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No. 106, ORIGINAL

In The

Supreme Court of the United States

October Term, 1990

STATE OF ILLINOIS,

Plaintiff,

versus

COMMONWEALTH OF KENTUCKY,

Defendant.

BRIEF IN RESPONSE TO KENTUCKY'S EXCEPTIONS TO REPORT OF SPECIAL MASTER FILED OCTOBER 1, 1990

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STATEMENT OF THE CASE

Illinois initiated this original action on July 24, 1986 seeking an order from this Court declaring its boundary with Kentucky to be the low-water mark on the Illinois side of the Ohio River as it existed in 1792. In its Answer filed December 15, 1986 Kentucky denied that the boundary is the 1792 low-water mark, claiming instead the low-water mark "as it exists from time to time". In support of its position, Kentucky cited the riparian principles of accretion, erosion and avulsion, and the equitable defenses of acquiescence and laches. Since that time, Kentucky has stated that its defense based on accretion, erosion and avulsion is not an independent basis for its position, but will only be applicable if it first prevails on its defense of acquiescence. Filing No. 52 at 7. Following lengthy discovery, the case was submitted to the Special Master on cross motions for summary judgment on January 4, 1990. Filings No. 39-44 and 47-52. After receiving supplemental documentation requested from the parties at the January 4 hearing, the Special Master submitted his report recommending a finding in favor of Illinois on all issues, which was formally received and ordered filed by the Court on October 1, 1990.

It is not disputed that Illinois, like Indiana and Ohio, was created from a portion of the territory northwest of the Ohio River ceded to the United States by Virginia in 1784, or that Kentucky was made a state in 1792, having been formed from a portion of the territory retained by Virginia. Exceptions of the Commonwealth of Kentucky to the Report of the Special Master filed October 1, 1990 (Exceptions) at 5-6.

Kentucky authorities have recognized that its Ohio River boundary is marked by the low-water mark on the northern side of the river as it existed in 1792, based on this Court's decision in *Indiana v. Kentucky*, 136 U.S. 479 (1890). These authorities include the decision of the Kentucky Supreme Court in *Perks v. McCracken*, 169 Ky. 590 (1916), Kentucky Attorney General Opinion No. OAG

63-847, issued in 1963, Filing No. 12(i), and Informational Bulletins Nos. 81 (1969) and 93 (1972), issued by the Legislative Research Commission of the Kentucky General Assembly. Filings No. 12(b) and 12(a).

In order to support its claim to have asserted continuous jurisdiction over the entire breadth of the Ohio River up to the low-water mark "as it exists from time to time", Kentucky submitted the testimony of four law enforcement officers, two Kentucky coroners, and two Coast Guard officers. One of the law enforcement officers described Kentucky's boundary as "the waterline, high water-mark or low water-mark", and then settled on "low-water mark". Filing No. 23(a) at 7. The others described it variously as "the normal standing pool of the Ohio River", Filing No. 23(c) at 7, "the water edge of the northern shore", Filing No. 23(d) at 5-6, or the point where the water touches the bank, Filing No. 26 at 5.

The Kentucky coroners identified several deaths on the river handled by their respective offices. In all of the cases identified, however, the body was recovered at a point south of the 1792 low-water mark as identified by Illinois' witness, Mr. Kriesle, or it was impossible to determine at what point the body was recovered. Report of Special Master at 23-24.

In response to the evidence provided by the two Kentucky coroners, Illinois submitted the testimony of coroners from the six Illinois counties bordering the Ohio River. Their opinions as to the present location of the boundary varied. Dr. Charles Diekroeger, coroner of Massac County, Illinois, testified for example that he did not know where it was located. Filing No. 37 at 7-8. Similarly, Mr. A. C. Cox, former coroner of Gallatin County, Illinois, also stated that he was not certain where the boundary was, Filing No. 34 at 6-7, while his son, Charles A. Cox, the present coroner, stated that "it was either a high-water mark or a low-water mark * * * back in the late 1700's". Filing No. 46 at 6-7.

In two of the Illinois counties arrangements had been made between the Illinois coroner and his Kentucky counterpart to resolve the question of jurisdiction over deaths occurring in the river. The first such arrangement was described by Mr. Granville Brownfield, coroner of Hardin County, Illinois. Although Mr. Brownfield contacts the Kentucky coroner to seek his permission to handle a body recovered in the Ohio River, the Kentucky coroner has always given that permission, even when the body of the deceased was still in the river at the time the Kentucky coroner arrived on the scene. Filing No. 45 at 5 and 13.

The second such arrangement was described by A. C. Cox, who testified that he and his Kentucky counterpart had agreed that each would be responsible for the remains of their own states found in the Ohio River. Filing No. 34 at 5. Mr. Cox, in fact, recalls one incident where he had to drive to Kentucky to recover the bodies of three Illinois residents recovered from the river. *Id.* at 12.

The first of two Coast Guard officers identified by Kentucky was John L. Bailey, Commanding Officer of the U.S. Coast Guard's Paducah Maritime Safety Station from 1976 to 1981. Filing No. 23(b) at 4-5. Kentucky alleged in its response to Illinois' interrogatories that Coast Guard personnel and Kentucky State Troopers had to deal with a threat of violence on the Ohio because "Illinois acknowledged it had no authority on the river". Filing No. 11 at 5. In fact, Commander Bailey testified that although an Illinois officer had expressed the opinion that he did not have jurisdiction on the river, it was nonetheless Illinois State Police officers who joined the Coast Guard personnel in the small boats assigned by Cmdr. Bailey to enforce the security or safety zone he imposed on the river. Filing No. 23(b) at 8-10 and 18-19.

Insofar as his personal understanding of the location of the boundary was concerned, Cmdr. Bailey was uncertain, saying that he did not recall whether it was the low water line, the pool line, or just what line it was. *Id.* at 15-16.

Kentucky also identified Coast Guard Captain Thomas Robinson and in particular an incident involving a fire on the towboat *Bayou Cauba*. Captain Robinson testified that the Golconda, Illinois volunteer fire department was unwilling to assist in dealing with this situation and that it did not believe it had the expertise to do so. Filing No. 25 at 7. When asked for his understanding of the boundary location, Captain Robinson identified the line as being marked by the low-water mark "fixed by the year in which that decision was made by whatever made it". *Id.* at 34.

In support of its position that it has not acquiesced to the boundary claimed by Kentucky, Illinois identified the decision in *Joyce-Watkins Co. v. Industrial Commission*, 325 Ill. 378 (1927). The Illinois Supreme Court acknowledged in that case that Illinois' boundary on the Ohio River to be the "low-water mark" on its side of the river. It concluded, however, that this phrase meant "the point to which the waters of that river have receded at its lowest stage". *Id.* at 383. This rule continued to be cited as late as 1973 in *People ex rel. Scott v. Dravo Corp.*, 10 Ill. App. 3d 944 (1973).

Illinois also submitted various legislation enactments and evidence of the enforcement of those enactments by the executive branch of its government in support of its argument that it has asserted jurisdiction over a portion of the Ohio River and has not acquiesced to Kentucky's claim to have exclusive jurisdiction over the entire river. Examples of such legislation include a statute requiring a license to occupy a shantyboat on the Ohio River, Laws of Illinois 1897, p. 248, Filing No. 10(k), and "An Act in relation to the regulation of rivers, lakes and streams of

the State of Illinois", Ill. Rev. Stat. 1987, ch. 19, par. 65. Pursuant to this latter statute, Illinois has issued 73 permits authorizing construction in the Ohio River or dredging of material from its bed. Filings 42(a) to 42(d) and Filing No. 55, Exhibits 29-33.

Finally, the record discloses that neither state has taxed the vast majority of structures extending from the Illinois shore into the Ohio River. Of the 15 such structures identified, Filings No. 56-58, Illinois has taxed only one. Filing No. 56, Exhibit 64. Kentucky has also consistently taxed only one structure. Its efforts to tax a second have resulted in a protest filed by the taxpayer. Filing No. 61, Exhibits 93 and 86-92.

SUMMARY OF ARGUMENT

Kentucky's Ohio River boundary with the states created from the Virginia Cession is the low-water mark on the northern shore of the river as it existed in 1792. *Handly's Lessee v. Anthony*, 5 Wheat (18 U.S.) 374 (1820); *Indiana v. Kentucky*, 136 U.S. 479 (1890); *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592 (1899); and *Ohio v. Kentucky*, 444 U.S. 335 (1980). Since Illinois, like Indiana and Ohio, was formed from this territory, its boundary with Kentucky is the 1792 low-water mark on the Illinois side of the river.

Kentucky cannot avoid the precedent of these cases unless it can prove its defense of acquiescence by demonstrating: (1) a continuous assertion of the boundary it claims in this litigation; and (2) acquiescence therein by Illinois. *Oklahoma v. Texas*, 272 U.S. 21 (1916). Kentucky cannot meet its burden as to either part of that test.

As previously noted by the Court in *Ohio v. Kentucky*, *supra* at 340-341, Kentucky itself has repeatedly acknowledged the 1792 low-water mark to be its proper boundary. Kentucky's assertion of the 1792 line can be found in its argument to the Court in *Indiana v. Kentucky* in 1890, in the decision of the Kentucky court in *Perks v. McCracken*,

169 Ky. 590 (1916), in Opinion of the Kentucky Attorney General No. OAG 63-847 issued in 1963, Filing No. 12(i), and in Information Bulletins Nos. 81 (1969), Filing No. 12(b), and 93 (1972), Filing No. 12(a), of the Legislative Research Commission of the Kentucky General Assembly.

Despite the existence of these documentary sources from all three branches of its government acknowledging the 1792 low-water mark, Kentucky asserts now that it has "always" claimed its boundary to be the low-water mark "as it exists from time to time". In fact, the record discloses that Kentucky has never claimed such a boundary anywhere except in this litigation.

The heart of Kentucky's case in support of its defense of acquiescence is the testimony of its four law enforcement officers, but this evidence fails to support Kentucky's case for a number of reasons. First, the witnesses differ among themselves as to their opinions on the location of the boundary, with no two of them describing it in identical terms, and none describing it in the terms Kentucky claims in its Answer. In addition, the very fact that the opinions of these witnesses also differ from the Kentucky documentary sources already cited demonstrates the lack of a continuous claim of right necessary for the defense of acquiescence. *See Oklahoma v. Texas, supra.*

In addition, even if the statements of these witnesses represent the unwritten policy of two Kentucky law enforcement agencies on their perception of their territorial jurisdiction, such policy has no effect on the boundary line already established by prior decisions of this Court. See *Arkansas v. Tennessee*, 246 U.S. 158 (1918) and *Arkansas v. Mississippi*, 250 U.S. 39 (1919).

Furthermore, even if it were assumed that Kentucky could establish a continuous claim to a boundary defined as the low-water mark as it exists from time to time, it cannot demonstrate acquiescence by Illinois to such a line. Not only did Illinois not acquiesce to the boundary claimed by Kentucky in this case, but for some 46 years

Illinois authorities asserted a boundary even more favorable than the 1792 low-water mark which Illinois now acknowledges to be correct.

In *Joyce-Watkins v. Industrial Commission*, 325 Ill. 378 (1927), the Illinois Supreme Court was asked to determine whether an accident that occurred 8 to 10 feet from the existing Illinois shore took place within Illinois. The court started with the premise that Illinois' boundary was the "low-water" mark on its side of the river, and concluded that this phrase meant "the point to which the waters of that river here receded at its lowest stage". *Id.* at 383. Applying that definition to the case before it, the court concluded that if the river had ever receded south of the point of the accident, that point would be within Illinois. Thus, although the court did, as Kentucky points out, contemplate a moving boundary, that movement would always favor Illinois, as each record for low water would move the boundary closer to Kentucky. This rule was cited as late as 1973 in the Illinois appellate court's decision in *People ex rel. Scott v. Dravo Corp.*, 10 Ill. App. 3d 944 (1973).

Evidence of Illinois' assertion of jurisdiction over a portion of the waters of the Ohio River can also be found in legislation enacted in 1897 requiring a license to occupy a shantyboat on the "Ohio, Mississippi, Wabash, Illinois, or other navigable river * * * within this State", Laws of Illinois 1897, p. 248, Filing No. 10(k), and prosecutions undertaken under that statute. Filing No. 55, Exhibits 23-26.

Similar evidence may also be found in the 73 permits issued by the State of Illinois for the building of structures on the Ohio River or the dredging of sand and gravel from its bed pursuant to section 18 of "An Act in relation to the regulation of the rivers, lakes and streams of the State of Illinois", Ill. Rev. Stat. 1987, ch. 19, par. 65, which requires such a permit before any work of any kind is done "in any of the public bodies of water within the State of Illinois". Copies of these permits may be

found in Filings 42(a) to 42(d) and Filing 55, Exhibits 29-33.

Clear evidence of both Kentucky's failure to continuously assert a claim to the entire breadth of the river, and of the mutual uncertainty that exists regarding the location of the boundary, can also be found in the supplemental documentation submitted by the parties regarding taxation of structures extending from the Illinois shore into the Ohio River. Illinois identified 15 such structures, Filings No. 56-58, but the only such structure taxed by Illinois is the Bunge facility in Alexander County. Filing No. 56, Exhibit 64. County taxing officials in the other five Illinois counties along the Ohio either have no such structures (Pope County), are not taxing them (Pulaski and Massac counties), or are not sure whether these structures are included in the tax base or not (Hardin and Gallatin counties). Filing No. 56, Exhibits 64, 72, 83, 98 and 103.

Kentucky claims that this supports its position regarding acquiescence, but ignores the fact that it has taxed only two of the same fifteen structures, and of those two, a protest is pending in one case based on the taxpayer's belief that the structure is located in Illinois. Filing No. 61, Exhibits 93 and 86-92.

Finally, the Special Master correctly concluded that the evidence submitted, including that of Kentucky's own witness, Dr. Petersen, shows that the dams built on the Ohio River have had the effect of raising the level of the river between Illinois and Kentucky so that the present low-water mark on the Illinois side is farther north than the 1792 low-water mark. See Filing No. 41, Exhibits 1 and 2, Filing No. 44 and Filing No. 61, Exhibit 156.

ARGUMENT

I.

PRIOR DECISIONS OF THIS COURT ESTABLISHING THE BOUNDARY BETWEEN THE COMMONWEALTH OF KENTUCKY AND THE STATES OF INDIANA AND OHIO, TO BE THE LOW-WATER MARK ON THE NORTHERLY SIDE OF THE OHIO RIVER AS IT EXISTED IN THE YEAR 1792 ARE CONTROLLING PRECEDENTS ON THE QUESTION OF KENTUCKY'S BOUNDARY WITH ILLINOIS.

A.

The fact that this Court has not considered acquiescence in the context of a case determining the entire boundary of any state bordering with Kentucky on the Ohio River is totally irrelevant to the threshold question, in this or any boundary case, of what is the legal rule to apply in determining the location of the disputed boundary.

Kentucky argues that the Special Master erred in concluding that prior decisions of this Court establishing the boundary between Kentucky and the States of Ohio and Indiana are controlling precedents in determining Kentucky's boundary with Illinois, since those cases did not address the defense of acquiescence, which Kentucky had raised here. This statement, however, demonstrates a basic misunderstanding of the nature of the defense of acquiescence in a boundary dispute.

The essence of the equitable defense of acquiescence is that the rule of law that would otherwise govern a given boundary can only be supplanted if two conditions are met: (1) the continuous assertion of a claim of right to a different boundary on one side; and (2) acquiescence to this claim on the other. *See, e.g., Oklahoma v. Texas*, 272 U.S. 21, 47 (1926).

Kentucky in its First Exception to the Special Master's Report apparently would have the Court accept the idea that its prior decisions are not controlling on the

legal question of Kentucky's Ohio River boundary merely because it has *raised* the defense of acquiescence. In fact, of course, those cases are applicable here and the rule of law they have established can only be avoided if Kentucky *proves* its defense of acquiescence.

B.

The prior decisions of this Court clearly provide that Kentucky's boundary with the states bordering it along the Ohio River is the low-water mark on the northerly side of the Ohio River as it existed in 1792.

As noted by the Special Master in the opening line of his report to this Court, "It is far too late in the day", *Ohio v. Kentucky*, 444 U.S. 335 (1980), for Kentucky to argue that its boundary with Illinois is the low-water mark as it exists from time to time. The legal issue of Kentucky's Ohio River boundary has been before this Court on four prior occasions, and the result of these decisions is to place Kentucky's boundary at the low-water mark on the northerly shore of the Ohio River as it existed in 1792.

The issue of Kentucky's Ohio River boundary was first addressed by the Court in *Handly's Lessee v. Anthony*, 5 Wheat. (18 U.S.) 374 (1820). In his opinion, Chief Justice Marshall found that this particular boundary was not to be resolved by the general rule that the territory of each state bordering a river extends to the middle of the stream. Instead, after reviewing the historical background leading to Kentucky's statehood, and in particular the Virginia Cession of 1793, the Chief Justice concluded that the entire river up to the northern low-water mark was within the boundary of Kentucky when it became a state in 1792.

The Court next addressed the issue of Kentucky's Ohio River boundary in *Indiana v. Kentucky*, 136 U.S. 479 (1890). It is significant to note, in light of Kentucky's present defenses of acquiescence and laches, that one

hundred years ago Kentucky argued that her boundary with Indiana should be determined, not by the low-water mark as it exists from time to time, but by the low-water mark as it existed in 1792.

In considering the facts of the case then before it, the Court in *Indiana v. Kentucky* observed that as of 1890 the land in dispute was separated from the Indiana shore by a mere bayou, and that under contemporary conditions it would have seemed preferable to locate the boundary at the existing low-water mark so as to place the disputed territory within Indiana. The Court rejected Indiana's arguments in this regard, however, the adopted Kentucky's position, defining its boundary as the low-water mark as it existed when Kentucky became a state on June 1, 1792.

> But the question here is not, as if the point were raised today for the first time, to what State and tract, from its situation, would now be assigned, but whether it was at the time of the cession of the territory to the United States, or more properly when Kentucky became a State separated from the mainland of Indiana by the waters of the Ohio River. * * * If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between the tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. *She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River* * * *. Here dominion and jurisdiction continued as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.*

Id. at 508. Emphasis added.

Subsequent to *Indiana v. Kentucky*, this Court has twice reiterated its position adopting the northern 1792 low-water mark as Kentucky's Ohio River boundary. In

Henderson Bridge Co. v. Henderson City, 173 U.S. 592 (1899), the issue was the authority of a Kentucky municipality to tax a railroad bridge built across the Ohio River to the Indiana shore. The Court found in favor of the city, relying on the fact that since Kentucky's own boundary was the low-water mark on the Indiana shore, it could properly bestow the same boundary on one of its municipalities. The Court based its conclusion regarding the location of Kentucky's boundary on its recent decision in *Indiana v. Kentucky*, describing that earlier decision in the following language:

> Referring to the channel of the Ohio River as it was when Kentucky was admitted to the Union, the court stated its conclusion to be that 'the jurisdiction of Kentucky at that time extended, and every since has extended, to what was then low-water mark on the north side of that channel'.

Id. at 613.

Ohio v. Kentucky, 444 U.S. 335 (1980), is the latest decision of the Court dealing with the location of Kentucky's Ohio River boundary. Just as in this case, Kentucky there rejected the position it had taken in *Indiana v. Kentucky*, placing its boundary at the 1792 low-water mark, and instead sought to claim the current low-water mark. The Court, however, rejected Kentucky's attempt to ignore that earlier decision and its historical foundation, and adopted the recommendation of the Special Master placing Kentucky's entire boundary with Ohio at the 1792 low-mark.[1]

> The fact that *Indiana v. Kentucky* concerned a portion of the Ohio River in its Indiana-Kentucky segment, rather than a portion of its

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[1] The location of Kentucky's boundary with Indiana was resolved on the same basis in *Kentucky v. Indiana*, 474 U.S. 1 (1985).

> Ohio-Kentucky segment, is of no possible legal consequence: the applicable principles are the same, and the holding in *Indiana v. Kentucky* has pertinent application and is controlling precedent here.

Id. at 339.

As the Special Master correctly found in his Report, this conclusion is equally applicable in the present controversy. Illinois, like Indiana and Ohio, was created from the territory ceded by Virginia to the United States. As a result, this Court's prior determinations of Kentucky's Ohio River boundary in *Indiana v. Kentucky* and *Ohio v. Kentucky* are controlling precedents here. The boundary between Illinois and Kentucky is, therefore, the low-water mark on the northern side of the Ohio River as it existed in 1792.

II.

THE RECORD DOES NOT SUPPO T KENTUCKY'S AFFIRMATIVE DEFENSES OF ACQUIESCENCE AND LACHES AND, THEREFORE, ILLINOIS' BOUNDARY WITH KENTUCKY IS THE LOW-WATER MARK ON THE ILLINOIS SIDE OF THE OHIO RIVER AS IT EXISTED IN 1792.

In many of the cases previously decided by this Court, the state successfully raising a defense of acquiescence has been able to point to surveys or maps setting out the boundary line it claimed. *See, e.g., Rhode Island v. Massachusetts*, 4 How. (45 U.S.) 591 (1846); *Virginia v. Tennessee*, 148 U.S. 503 (1893); and *Maryland v. West Virginia*, 217 U.S. 1 (1910). As the Court observed in *Virginia v. Tennessee, supra* at 522, "a boundary line between States * * * located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years is conclusive".

In the present case, however, there is no such survey or map that Kentucky can point to in support of its position that its boundary is the current low-water mark

or shore. On the contrary, the existing cartographic evidence clearly supports Illinois. As noted by the Special Master, the Illinois/Kentucky boundary is shown on a series of 22 maps, known as quads, produced by the U.S. Geological Survey (U.S.G.S.). Report of Special Master at 16-17. The boundary depicted on these quads represents the position of the low-water mark as determined by a U.S. Army Corps of Engineers' survey of the Ohio River conducted near the turn of the century, prior to the construction of dams on the river. Filing No. 41, Exhibit 1, pars. 15-30. An examination of these 22 quads discloses that, with the exception of several areas involving former islands now attached to the Illinois shore, the boundary line shown is generally 100 feet or more south of the existing Illinois shore. *Id.* at par. 30. Furthermore, as Kentucky's own witness concedes, the low-water mark derived from the Corps of Engineers' survey, and transferred to the U.S.G.S. quads, is "the most accurate representation of the low-water mark on the north side of the Ohio River". Filing No. 61, Exhibit 156, par. 9. Finally, it should be noted that Kentucky's boundary with Indiana and Ohio was ultimately plotted using this same Corps of Engineers survey data, and it is this same data that Illinois proposes to use to resolve the Illinois/Kentucky boundary. Filing No. 41, Exhibit 1, pars. 15-30.

In addition, Kentucky's defense of acquiescence must be evaluated in light of the fact that Kentucky's Ohio River boundary has previously been before this Court, not once, but four times, and in each of the last three cases the Court unequivocally found that Kentucky's Ohio River boundary was the 1792 low-water mark on the northern shore. No other state has ever attempted to raise the equitable defense of acquiescence to avoid a legal boundary specifically and repeatedly defined by prior decisions of this Court.

The Court has, however, confronted somewhat analogous situations in two cases involving Arkansas' Mississippi boundary: *Arkansas v. Tennessee*, 246 U.S. 158 (1918); and *Arkansas v. Mississippi*, 250 U.S. 39 (1919). The Court

began its opinion in the first case with a thorough recounting of its earlier decision in *Iowa v. Illinois*, 147 U.S. 1 (1893), which laid down the so-called thalweg rule. Under this rule, the boundary between two states separated by a river is the middle of the main navigable channel, not the midpoint between the banks.

Tennessee and Mississippi tried to avoid the application of the thalweg rule by arguing that Arkansas had acquiesced to a boundary marked by a line equidistant from the permanent banks. In support of their position, both states pointed to court opinions from their own courts and those of Arkansas recognizing this line as the boundary.

In both cases, the Court rejected the defense of acquiescence, noting in *Arkansas v. Tennessee, supra* at 172 that even the existence of the cases recognizing the line claimed by Tennessee fell "far short" of the showing necessary to establish a defense of acquiescence. In *Arkansas v. Mississippi, supra*, the Court went further in elaborating its reasoning for rejecting the defense of acquiescence despite the favorable state case law relied upon by Mississippi:

> But whatever may be the effect of these decisions upon local rights of property or the administration of the criminal laws of the State, when the question becomes one of fixing the boundary between States separated by a navigable stream, it was specifically held in *Iowa v. Illinois, supra*, followed in later cases, that the controlling consideration is that which preserves to each State equality in the navigation of the river, and that in such instances the boundary line is the middle of the main navigable channel of the river. In *Arkansas v. Tennessee, supra*, p. 171, we said: 'The rule thus adopted, [that declared in *Iowa v. Illinois*] known as the rule of the "thalweg", has been treated as set at rest by that decision. *Louisiana v. Mississippi*, 202 U.S. 1, 49; *Washington v. Oregon*, 211 U.S. 127, 134; 214 U.S. 205, 215. * * *'

> We are unable to find occasion to depart from this rule because of long acquiescence in enactments and decisions, and the practices of the inhabitants of the disputed territory in recognition of a boundary, which have been given weight in a number of our cases where the true boundary line was difficult to ascertain. (See *Arkansas v. Tennessee, supra*, and the cases cited at p. 172.)

Id. at 45.

The relevance of this language to the present case is readily apparent. In *Arkansas v. Mississippi*, this Court rejected a defense of acquiescence despite the existence of case law in both states recognizing the boundary that Mississippi claimed, and it did so because the true boundary was *not* "difficult to ascertain" as a result of the general rule it had earlier set out in *Iowa v. Illinois*.

In the present case, not only is there no case or other document of any kind in either state adopting the boundary claimed by Kentucky, there are also three prior decisions of this Court over the past 100 years specifically involving Kentucky's Ohio River boundary and finding that special historical considerations place that boundary at the 1792 low-water mark. As a result, Kentucky's defense of acquiescence must fail.

A.

Kentucky has failed to meet its burden of establishing its affirmative defense of acquiescence.

As previously noted, a party claiming the benefit of the equitable defense of acquiescence must demonstrate two things: (1) a long and continuous assertion of a claim of right on its side; and (2) acquiescence therein by the other side. *See, e.g., Oklahoma v. Texas*, 272 U.S. 21, 47 (1926). After a thorough examination of the record here, the Special Master concluded that "it seems abundantly clear that Kentucky has not demonstrated a continuous assertion of right in favor of the boundary it has claimed in this litigation." Report of Special Master at 12.

(1) Kentucky sources have consistently recognized the 1792 low-water mark as Kentucky's boundary.

As the Special Master noted, his conclusion that Kentucky has failed to meet its burden is amply supported by the fact that since at least the time of *Indiana v. Kentucky*, there are official statements from all three branches of Kentucky government acknowledging Kentucky's Ohio River boundary to be the northern low-water mark as it existed in 1792. The existence and significance of these sources was in fact commented upon in *Ohio v. Kentucky*, *supra*, where the Court noted that "it is of no little interest that Kentucky sources themselves, in recent years, have made reference to the 1792 low-water mark as the boundary." *Id.* 444 U.S. at 340-341.

a. Kentucky Attorney General's Opinion.

One such source is Opinion Number OAG 63-847 issued by the Attorney General of Kentucky on September 13, 1963. The opinion was written in response to a request from the Kentucky Department of Fish and Wildlife Resources for a declaration as to the location of Kentucky's Ohio River boundary. The attorney general's response is clear and unequivocal:

> The law, of course, is that the boundary line between the states of Indiana and Kentucky is the low-water mark on the north shore of the Ohio as it existed when Kentucky became a state in 1792. *State of Indiana v. Commonwealth of Kentucky*, 10 S. Ct. 1051, 136 U.S. 479, 34 L. Ed. 329 (1889).

Filing No. 12(i) at 1. Attorney General Breckinridge also pointed out that "the old low-water mark does not under present water level conditions extend right to the Indiana shore", *id.* at 2, since dams built on the river had raised the water level.

Kentucky argues that this Opinion is advisory only and, therefore, does not constitute binding authority

regarding the location of the Illinois-Kentucky boundary. This argument misses the point. The Opinion is not cited as authority for the proposition that the 1792 low-water mark is the boundary. Sufficient precedent for that proposition exists in decisions of this Court.

Rather, the Opinion of the Kentucky Attorney General was cited by Illinois and accepted by the Special Master as unequivocal evidence that Kentucky has *not* continuously asserted its boundary along the Ohio to be the low-water mark as it exists from time to time. The question whether that Opinion is advisory or not is irrelevant in this context.

Kentucky also argues that the Attorney General's Opinion erroneously construed *Indiana v. Kentucky*. This too is irrelevant. The fact remains that in this Opinion the Kentucky Attorney General asserted a position plainly at odds with Kentucky's current position regarding its supposedly continuous claim to the low-water mark as it exists from time to time. In addition, Kentucky's assertion that Attorney General Breckinridge misconstrued *Indiana v. Kentucky* will not stand up to scrutiny, since his interpretation of that case is precisely the interpretation applied by this Court in *Ohio v. Kentucky*.

b. Bulletins of Kentucky Legislative Research Commission.

Attorney General Breckinridge's understanding of the meaning of *Indiana v. Kentucky* was not an isolated incident. As the Special Master has noted, there are also documents from the legislative branch of Kentucky government which are plainly at odds with Kentucky's position here. The first of these is Informational Bulletin No. 81 issued by the Legislative Research Commission of the Kentucky General Assembly, and dated December, 1969. Filing No. 12(b). The Forward to this document relates that it is the result of the work of the subcommittee on the Ohio River Boundary, formed in 1966 to study the boundary problem as a result of 150 years of recurring

litigation on that issue. The authors also acknowledge that the final resolution of the boundary issue must be made by this Court. As the Special Master observed, these remarks are inconsistent with Kentucky's claim to have continuously asserted the low-water mark as it exists from time to time as its boundary.

Furthermore, in its summary of prior litigation set out in Chapter II, the Legislative Reference Commission has this to say about *Indiana v. Kentucky*:

> In *Indiana v. Kentucky*, 136 U.S. 479 (1890) the Supreme Court was confronted with a dispute as to the ownership of Green River Island which at the time of the suit was located on the north side of the Ohio River. In finding that at the time when Kentucky became a state, the low-water mark of the river was north of the island, *the Court determined that the boundary between states of Indiana and Kentucky was the low-water mark on the Ohio River as the mark existed in the year of 1792.*

Informational Bulletin No. 81, Filing 12(b) at 18. Emphasis added. Certainly, the Legislative Research Commission did not view *Indiana v. Kentucky* in the limited fashion in which Kentucky now claims to view it.

Additional evidence of Kentucky's acknowledgment of the 1792 low-water mark can be found in Informational Bulletin No. 93 issued by the Kentucky Legislative Research Commission in December, 1972. Filing No. 12(a). This document also addresses the issue of Kentucky's Ohio River boundary and in doing so offers the same interpretation of *Indiana v. Kentucky* found in Informational Bulletin No. 81 and Attorney General Opinion No. OAG 63-847. "Kentucky's North and Western boundary, to-wit, the low water mark on the North shore of the Ohio River *as of 1792* has been recognized as the boundary based upon the fact that Kentucky was created from what was then Virginia." Bulletin No. 93, Filing 12(a) at 3. Emphasis added.

Furthermore, as the Special Master recognized, it is clear that the authors of Bulletin No. 93 were aware of the

consequences to Kentucky of adherence to the 1792 line since they noted that "and conceivably there could be places * * * where a state on the north shore of the Ohio River may have a true boundary that extends as much as 100 yards or more into the stream." Bulletin No. 93, Filing No. 12(a) at 4.

Kentucky again attacks these documents as it does Opinion OAG 63-847, claiming they "do not and cannot represent the sovereign position of the Commonwealth". Once again, this argument misses the point. Like the Opinion of the Kentucky Attorney General, these documents are proof that Kentucky has not continuously asserted its boundary along the Ohio to be the low-water mark as it exists from time to time.

c. Kentucky case law.

Finally, as the Special Master has pointed out, the decisions of Kentucky's courts also provide no support for its position here. The most damaging of these from Kentucky's perspective is the decision in *Perks v. McCracken*, 169 Ky. 590 (1916). That case involved a dispute over the ownership of a towhead in the Ohio River near Mound City, Illinois. Since the plaintiff traced his title to a patent issued by Kentucky in 1854, the Kentucky court concluded that the case would be resolved on the question whether the towhead was part of Kentucky or Illinois. In order to resolve that question, the court turned to *Indiana v. Kentucky* and, applying that precedent to the case before it, concluded that the issue was "where was the low-water mark at the time Kentucky became a state, and does the island in question lie between the low-water mark as it then existed and the Kentucky shore? If so it is part of Kentucky." *Id.* at 591.

Kentucky attempts to distinguish this case by arguing that the rule in *Indiana v. Kentucky* was limited to islands, and since an island was at issue in *Perks v. McCracken*, the latter has no precedential value here. It is sufficient response to note that this Court in *Ohio v.*

Kentucky obviously disagreed with Kentucky's limited interpretation of *Indiana v. Kentucky*, since it applied the rule of law set out there to locate Kentucky's entire boundary with Ohio and Indiana. Furthermore, there is nothing in the language of *Perks v. McCracken* to suggest that the Kentucky court understood *Indiana v. Kentucky* to be so limited. As a result, *Perks v. McCracken* stands as another, prominent instance in which Kentucky did not assert the boundary it now claims.

As the Special Master points out at pages 18-19 of his Report, there are also many other Kentucky cases which discuss Kentucky's Ohio River boundary as being located at the low-water mark. Although none of these cases describes that mark as the one existing in 1792, it is also true that not a single one of them defines the boundary in the manner Kentucky now claims – as the low-water mark that exists from time to time. Thus, although not direct support for the 1792 line itself, as is *Perks v. McCracken*, these cases plainly do not support Kentucky's position either.

2. Kentucky's evidence does not support its claim to have continuously asserted a boundary identified by the low-water mark as it exists from time to time.

a. Testimony of Kentucky law enforcement officers.

In that part of its Exceptions to the Report of the Special Master dealing with the testimony of its law enforcement officers, Kentucky seeks to gloss over the uncertainty and contradictions reflected there and says that the record shows that these individuals enforced Kentucky fish and game laws up to "the Illinois shore", attempting apparently to equate "the shore" with "the low-water mark as it exists from time to time".

Former Water Patrol Officer Storms, for example, first described the boundary as "the waterline, high water-mark or low water-mark", and then settled on "low

water-mark". Filing No. 23(a) at 7. When asked whether the boundary changed with the level of the river, he replied, "It never changed the boundary as far as I know." Filing No. 23(a) at 7-8. On re-cross examination Mr. Storm in fact testified that in his mind low-water mark and shoreline are the same thing. Filing No. 23(a) at 16-17.

Captain David Loveless of the Kentucky Department of Fish and Wildlife's Division of Law Enforcement, testified that his understanding of the location of the boundary was "the normal standing pool of the Ohio River". Filing No. 23(c) at 7. Later, on cross-examination, when asked to relate standing pool to the low-water mark, he responded that "standing pool would probably be the low-water mark". Filing No. 23(c) at 15-16. When asked if there was anything in writing setting out his Department's position regarding the boundary, he replied that there was none, and that it was a matter of oral tradition. Filing No. 23(c) at 7-8.

The third law enforcement officer to testify was Steven Owens. He stated his understanding of the boundary to be the "water edge of the northern shore". Filing No. 23(d) at 5-6. When asked for the source of his opinion as to the boundary's location, he replied, "I'm not exactly sure. It's just – its always been the policy that was handed down to me, and I understand that that's the way the Constitution read." Filing No. 23(d) at 6.

The final law enforcement officer deposed was David Jenkins, who stated that in his understanding, the boundary on the Ohio was the point where the water touches the bank. Filing No. 26 at 5. Like the other Kentucky law enforcement officers, he was unable to point to any authority for his opinion, saying simply, "You know, prior to me, everybody knows that the Ohio River is Kentucky." Filing No. 26 at 6.

Illinois submits that this last remark sums up the essence of Kentucky's argument regarding its claim in this litigation. "Everybody knows" Kentucky has always claimed the low-water mark as it exists from time to time,

despite the fact that there is not a single witness, document or judicial decision Kentucky can point to which substantiates this claim.

Certainly none of the law enforcement officers described the boundary in anything like the terms Kentucky asserts here. In fact, only Mr. Storms mentioned a low-water mark at all without prodding from counsel, and he plainly was not sure whether the boundary was really marked by the high-water mark or low-water mark.

It is in the context of seeking to fit this testimony into its theory of the case that Kentucky confuses the question of what in fact constitutes the low-water mark. Kentucky must describe the boundary it claims in this case in terms of the low-water mark because the cases of this Court dealing with Kentucky's Ohio River boundary, beginning with *Handly's Lessee v. Anthony, supra,* have all defined that boundary to be the northern low-water mark. Kentucky's suggestions, that statements placing the boundary at the water's edge, the shore or the standing pool are the equivalent of asserting the low-water mark as it exists from time to time are, however, completely unsubstantiated.

There is one other basic problem with Kentucky's reliance on the testimony of its four law enforcement officers. If "everybody knows" that Kentucky has "always" claimed the low-water mark as it appears from time to time to be its boundary, how did the Kentucky Legislative Research Commission's Informational Bulletins Nos. 81 and 93, Attorney General Opinion OAG 63-847, and *Perks v. McCracken* come to be written? It seems inconceivable that this supposedly open and continuous claim of right was overlooked by a legislative commission specifically created to study the Ohio River boundary, as well as Kentucky's Attorney General and the court in *Perks v. McCracken*. At most, the contradictions between the official sources adopting the 1792 line on Kentucky's behalf and the conflicting statements

of these witnesses display a level of uncertainty on Kentucky's part wholly at odds with its defense of acquiescence. *See Oklahoma v. Texas*, 272 U.S. 21 (1926).

b. Testimony of coroners.

The testimony of Kentucky's two coroners is even less persuasive from Kentucky's perspective than that of its law enforcement officers. As pointed out by the Special Master, none of the seven drownings described by these individuals was shown to have taken place north of the 1792 low-water line. Report of Special Master at 23-24. Since Illinois acknowledges Kentucky's jurisdiction south of that line, a drowning that cannot be shown to have taken place north of the 1792 low-water mark adds nothing to Kentucky's case.

Kentucky complains in its Exceptions to the Report of the Special Master that it was unfair of the Special Master to reject the evidence of its coroners since the 1792 low-water mark has not been plotted along that part of the river between Illinois and Kentucky. In response to this point, Illinois notes first, that Kentucky acknowledges that it had the burden of demonstrating a continuous claim of right to a boundary other than the 1792 low-water mark. If it chooses to do so by offering evidence of deaths on the Ohio handled by Kentucky coroners, it must be able to prove the deaths occurred in that portion of the river in dispute. If it cannot do so, it has not met its burden of proof.

In addition, it should be pointed out that Illinois has done precisely that which Kentucky said has not been done. Illinois has produced a series of maps depicting the 1792 low-water mark along the Illinois side of the Ohio using precisely the same methods used by Kentucky to resolve her boundaries with Indiana and Ohio.[2] Furthermore, these maps verify that, in those cases where it is

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[2] Affidavit of William Kreisle (Filing No. 41, Exhibit 1).

possible to identify where the body was recovered, the drownings took place on the Kentucky side of the 1792 line.

In addition to overstating the value of the testimony of its two coroners in its Exceptions to the Special Master's Report, Kentucky also distorts the significance of the testimony of the six Illinois coroners deposed, and the existence of the 214 deaths in the Ohio River handled by Illinois coroners over the past eighty years. While it is certainly true that the Illinois coroners differ in their practices and opinions as to the boundary's location, those very differences reflect uncertainty of a sort incompatible with a finding of acquiescence. Similarly, as the Special Master points out in his Report, the informal, practical accommodations that have existed between various Illinois coroners and their Kentucky counterparts do not constitute evidence of acquiescence since they are not based on a concession of right by either party, but instead are an obvious reflection of mutual uncertainty. In seeking to challenge the Special Master's conclusions in this regard, Kentucky omits pertinent facts from the record and fails to address certain unfavorable conclusions that are inherent in the facts on which it does rely.

For example, in commenting on the statement of Dr. Charles Diekroeger, coroner of Massac County, Illinois, Kentucky correctly notes that he has always called the coroner of McCracken County, Kentucky when a body is found in the river. Filing No. 37 at 7. Kentucky fails to relate, however, that Dr. Diekroeger also testified that he did not know where the Illinois-Kentucky boundary was located, and that a former deputy coroner, Herb Goyert, now deceased, had handled a case involving a body recovered from the Ohio. Filing No. 37 at 7-8.[3]

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[3] The incident in question is described in Answer 3(239) of Illinois' Supplemental Answers to Defendant's First Set of

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In describing the testimony of David W. Barkett, coroner of Alexander County, Illinois, Kentucky says that Mr. Barkett would take jurisdiction over a body if it were located on Illinois land. Once again, however, this is only part of the story. Mr. Barkett also testified that he had handled three or four drownings in the Ohio. Filing No. 36 at 5-6. More significantly, in one incident involving the death of Leslie Kerr, the body was found in the river and then brought to the Illinois shore, where Mr. Barkett as chief deputy coroner pronounced him dead and took custody of the deceased. Despite the fact that the body was recovered from the water, when Kentucky officials arrived on the scene they agreed the case was properly within Mr. Barkett's jurisdiction. *Id.* at 12-13.

This latter point is particularly important in light of the evidence given by Kentucky's own witness, Mr. Jerry Beyer, coroner of McCracken County, Kentucky. When asked to describe the jurisdiction of his office, he replied that the controlling factor was the point at which the body was recovered. Filing No. 29 at 13. Applying this rule to the incident involving Leslie Kerr, it is clear that under Kentucky's theory of this case the Kentucky authorities should have pressed their claim to jurisdiction over Mr. Kerr's remains, since his body was recovered in the river.

Kentucky also makes much of the testimony of Granville Brownfield, long-time coroner of Hardin County, Illinois. As Kentucky correctly points out, Mr. Brownfield stated that in each of the deaths occurring near the Hardin County, Illinois shore during his tenure, he has taken custody of the body only after obtaining approval from the coroner for the Kentucky county across the river. Filing No. 45 at 5. Kentucky fails to comment, however,

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Written Interrogatories, Filing No. 31, and the accompanying death certificate may be found at page 160 of Exhibit 9 to Plaintiff's Motion for Summary Judgment. Filing No. 41.

on the fact that the Kentucky coroner never in fact took jurisdiction over a single one of these incidents, *id.* at 13-14, or that Mr. Brownfield could only recall the Kentucky coroner coming to the scene in two of the five incidents he recounted. *Id.* at 11 and 13. In fact, in the most recent case handled by Mr. Brownfield, the body of the deceased was in the river at the time the Kentucky coroner arrived, and despite this fact, he once again agreed that Mr. Brownfield should handle the case. *Id.* at 13.

While admittedly unusual, this arrangement between Mr. Brownfield and his Kentucky colleague does not support Kentucky's theory of acquiescence. If the Kentucky coroner truly believes his jurisdiction covers the entire breadth of the Ohio River, under what authority does he delegate this jurisdiction to an Illinois coroner? Kentucky offers no answer to this question.

The final Illinois coroners discussed by Kentucky are A. C. and Charles Cox, a father and son, who together have served as coroner for Gallatin County, Illinois for over sixteen years. Filing No. 34 at 4 and Filing No. 46 at 3. Mr. A. C. Cox related that he and his Kentucky counterpart had reached an informal understanding whereby each was responsible for the remains of residents of their own states found in the Ohio River. Filing No. 34 at 5. Mr. Cox recalled one incident, in fact, in which he was called upon to drive to Uniontown, Kentucky to recover the bodies of three Gallatin County, Illinois residents that had been recovered from the river. *Id.* at 12.

As the Special Master concluded, this arrangement, like that of Mr. Brownfield and his Kentucky colleague, was based not on any concession of right that would support a finding of acquiescence, but rather on mutual uncertainty. This conclusion is buttressed by the fact that when asked his understanding of the location of the boundary, Mr. Cox replied, "whether it's a high water

line or a low water line, I don't know. That's what nobody knows." *Id.* at 7.

Charles A. Cox, the present coroner of Gallatin County, recalled only one drowning in the Ohio River during his time in office. Filing No. 46 at 4. The details of this one incident are of some significance, however, since it marked the end of the arrangement between the Gallatin County coroner and his colleague in Kentucky previously described by A. C. Cox.

On the day of the incident in question, Mr. Cox had gone to the bank of the river near Shawneetown, Illinois in response to a call that a man had jumped into the Ohio River. He testified about having a brief conversation with the Union County, Kentucky coroner during which the latter confirmed that in keeping with the prior understanding between their offices Mr. Cox should handle the case, since the victim was an Illinois resident. *Id.* at 4-5.

When the body was finally recovered and brought to the Illinois shore, however, the Union County coroner and a Kentucky State Trooper appeared and demanded custody of the body. Mr. Cox testified that he did relinquish the body to the Kentucky authorities, but *not*, as Kentucky suggests, because he acknowledges Kentucky's jurisdiction over all bodies recovered in the Ohio River. Instead, his decision was based, first, on the fact that he did not have time to seek the legal advice of his county's state's attorney. In addition, he stated that he did not wish to leave the body lying on the bank with the relatives standing by while he engaged in a dispute over custody of the deceased with the Kentucky coroner and an increasingly belligerent Kentucky State Trooper. *Id.* at 4-6.

Mr. Cox's reasoning and decision demonstrated common sense and compassion. In no way, however, did they reflect acquiescence to Kentucky's claim to jurisdiction over the entire river. Had he agreed with that claim, there would have been no need to consult his county state's

attorney as, he testified, that he had wished to do. This conclusion is supported by his personal uncertainty as to the location of the boundary.

> Well, the way I've always been told was something to do – it was either a high water mark or a low water mark. * * * Back in the late 1700's – well, my gosh, you know, the river has gotten a lot larger since then, and how you going to tell where that mark is. In all reality, I'm sure that water line is probably way out into the river somewhere by now, but I don't know how we would ever determine that.

Id. at 6-7.

In fact, as the recent resolution of Kentucky's boundary disputes with Indiana and Ohio demonstrates, it is possible to locate the 1792 low-water mark to the satisfaction of the parties.[4] Absent such formal agreements locating the boundary, however, local officials in both states are left to work out practical accommodations of the sort described by the Gallatin and Hardin County, Illinois coroners. Such accommodations do not demonstrate acquiescence since they are not based on an acknowledged claim of right, but on mutual uncertainty.

c. Testimony of Coast Guard officers.

In addition to the law enforcement officers and coroners whose testimony has already been discussed, Kentucky also identified as witnesses two former commanding officers of the U.S. Coast Guard Maritime Safety Station on the Ohio River at Paducah, Kentucky. Kentucky describes their testimony regarding several incidents on the river as demonstrating "typical" examples of "Illinois recognition that Kentucky's boundary is

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[4] See Kreisle Affidavit, Filing No. 41, Exhibit 1, at pars. 22-25; Report of Special Master, No. 27 Original, adopted at 471 U.S. 153 (1985); and Report of Special Master, No. 81 Original, adopted at 474 U.S. 1 (1985).

the northwestern shore as it exists from time to time." Exceptions at 25.

The first point to note in responding to this claim on Kentucky's part is that it has once again substituted northwestern "shore" for "low-water mark". This imprecise use of terminology demonstrates yet again that Kentucky's position here is not the reflection of a clearly articulated, continuous claim of right to a boundary other than the 1792 low-water mark. It is, instead, an attempt to fit unrelated and sometimes divergent facts into a theory enunciated only in this litigation.

The first of the two Coast Guard officers deposed was John L. Bailey, commanding officer of the U.S. Coast Guard's Paducah Maritime Safety Station from 1976 to 1981. Filing 23(b) at 4-5. Commander Bailey was identified as a witness with knowledge of an incident involving a strike at a coal loading facility on the Illinois shore. According to Kentucky's response, the Coast Guard and Kentucky State Troopers dealt with the situation because "Illinois acknowledged it had no authority on the river". Filing No. 11 at 5 and Filing No. 17 at 2. The facts as related by Commander Bailey were significantly different, however.

Cmdr. Bailey recalled being contacted by "some official's office in Illinois" to prevent strikers from entering the facility from the Ohio River side. To accomplish this, he declared a safety or security zone in the area, which gave him authority to control access. Filing 23(b) at 5.

Although Cmdr. Bailey committed several vessels and significant personnel to this assignment, he remembered expressing concern to law enforcement officers from both states about the safety of his personnel, since none of them had law enforcement experience. *Id.* at 8-9. Contrary to Kentucky's statement in its response to Illinois' interrogatory, however, this concern did not result in any Kentucky law enforcement personnel joining Coast Guard personnel in the small boats used to enforce the

safety or security zone. Instead, it was Illinois' State Troopers who manned the small boat patrol with Cmdr. Bailey's personnel. *Id.* at 8-10 and 18-19.

It is true that Cmdr. Bailey recalled the officer in charge of the Illinois State Police contingent assigned to the strike to have expressed the belief that he had no authority on the Ohio River. *Id.* at 8 and 12. The effect of this remark was more than counteracted, however, both by the action of Illinois officials in placing Illinois officers on the river *and* by Kentucky's failure to object to their presence. Had Kentucky officials felt that the presence of Illinois officers on "their" river was an infringement upon their jurisdiction, they had the opportunity to object and insist that Kentucky officers be substituted. The record discloses no such action on their part.

Kentucky also discussed the testimony of Coast Guard Captain Thomas Robinson, and in particular his account of the sinking of the towboat *Bayou Cauba*. Although Capt. Robinson stated that the Golconda, Illinois Volunteer Fire Department was "unwilling" to assist in putting out a fire on the boat, he also noted that it felt it did not have the expertise to do so. Filing No. 25 at 7. This latter fact significantly reduces whatever value Kentucky might have derived from this incident.

One final and relevant aspect of the testimony of these two witnesses not remarked upon by Kentucky was their understanding of the location of Kentucky's Ohio River boundary. Cmdr. Bailey, like the majority of the witnesses heard from, was simply uncertain as to its location, saying, "Well, I don't remember what it was, the low water, the pool line, or what line that was, but just the water line on the other side of the river. You know, there are a lot of different water lines that people refer to on the rivers." Filing 23(b) at 15-16. Such uncertainty is

not indicative of a widely known continuous assertion of a claim of right by Kentucky.

Capt. Robinson's testimony regarding the boundary was even less supportive of Kentucky's position. He first correctly identified the line as being marked by the northern low-water mark, and when asked to specify whether that low-water mark was fixed at some point in time, he responded that "It was my understanding that the boundary was fixed by the year in which that decision was made by whatever court made it * * *." Filing No. 25 at 34.

It is unclear whether Captain Robinson had in mind this Court's 1980 decision in *Ohio v. Kentucky* or its 1890 decision in *Indiana v. Kentucky*. Regardless of which case he had in mind, it is clear that his understanding of the boundary involved a low-water mark fixed at some point in time, and not a low-water mark as it exists from time to time.

B.

Illinois has exercised jurisdiction over a portion of the Ohio River throughout its history and, thus, has not acquiesced to the boundary claimed by Kentucky in this case.

Illinois believes the Special Master is clearly correct in his conclusion that Kentucky has failed to demonstrate a continuous claim of right to the boundary it now asserts in this case. As the Special Master also found, however, even if it is assumed for the purpose of argument that Kentucky has met this burden, the record does not support a finding that Illinois has acquiesced to a boundary other than the 1792 low-water mark.

(1) Illinois sources relied upon by Kentucky do not demonstrate acquiescence.

a. Diers' correspondence.

In its Exceptions to the Report of the Special Master, Kentucky makes much of two letters written in September of 1954 by H. E. Diers, Assistant Engineer of Maintenance for the Illinois Department of Public Works and Buildings. In one letter addressed to William MacLeod, District Engineer for the Illinois Department of Public Works, Mr. Diers refers to the boundary language contained in the Illinois Constitution of 1870, and states that, "This I believe can be interpreted to mean the shoreline at the mean, normal, water elevation along the Illinois shore." Filing No. 12(m). The second letter addressed to W. J. Crouse, Director of the Division of Maintenance of the Kentucky Department of Highways, contains similar language. Mr. Diers also states there that, "[i]t is possible" that the boundary can be fixed as he suggests and that it "can probably be determined by examination of the gauge readings in the U.S. Engineers' office at Cairo". Filing No. 12(l).

As the Special Master observed, Diers' words reflect uncertainty, rather than clear acquiescence in any claim of right on Kentucky's part. This conclusion is reinforced by the final paragraph of the second letter in which Diers asks the Director of Maintenance of the Kentucky Department of Highways whether he "concur[s] in this method or if he will be kind enough to make a suggestion in regard to the establishment of this state line." If Mr. Diers' letters truly reflected acquiescence to Kentucky's continued claim of right, it would have been unnecessary for him to inquire as to Kentucky's position in this matter.

Despite these problems, Kentucky asserts that the Diers correspondence "dramatically supports Kentucky's position in this case. It shows: that an Illinois official recognized that Kentucky's jurisdiction over the river

extends to the shoreline at the mean, normal water elevation along the Illinois shore." Exceptions at 29.

First, it is reasonable to ask whether or not Mr. Diers would have considered himself as a "state official" undertaking to actually establish by his action Illinois' boundary with the state of Kentucky. As the Special Master notes, it is much more reasonable to conclude that the purpose of Mr. Diers' correspondence "was not to locate the state boundary precisely, but simply to place a sign on the bridge somewhere near the approximate state line to alert motorists that they were entering or leaving Kentucky or Illinois." Report of Special Master at 26.

Although Kentucky disputes such a mundane meaning for this "dramatic" evidence, the Special Master's determination is further supported by an additional item in the record which Kentucky fails to mention. This document is the response from Mr. MacLeod, the Illinois district engineer responsible for the Cairo bridge, to Mr. Diers' September 28, 1954 letter. In this response, dated October 5, 1954, Mr. MacLeod states that the Illinois state line is shown on the plans for the Ohio River bridge at Cairo, and that in his opinion "the State line shown on the Ohio River Bridge plans *is 'ose enough to the theoretical State line* that it will be unnecessary to confer with the Department of Highways of Kentucky". Filing No. 41, Exhibit 12. Emphasis added.

b. Bridge agreements.

In addition to the Diers correspondence, Kentucky also relies on evidence submitted regarding bridge maintenance agreements supposedly demonstrating acquiescence on the part of Illinois. Filing No. 61, Exhibits 53, 61, 64, 66a. Illinois believes these documents are equivocal at best, and do not support Kentucky's claim of acquiescence. In support of its conclusion, Illinois relies upon the response of Special Master Judge VanPelt in his report of January 3, 1979 in *Ohio v. Kentucky*, No. 27, Original.

There, Judge VanPelt was offered similar evidence regarding bridge agreements which Kentucky proposed to offer as evidence of acquiescence to a line other than the 1792 low-water mark. In rejecting this offer of evidence on Kentucky's part, Judge VanPelt said:

> Your Special Master concludes that it would not be a benefit to take evidence involving the bridge contracts. Undoubtedly an agreement as to the boundary was made merely to expedite and facilitate the construction of bridges. At approximately the same time as these contracts were being executed there were the Kentucky legal opinions above mentioned recognizing the 1792 boundary. Your Special Master prefers to rely on the previous cases in this Court rather than bridge agreements.

Report of Special Master, No. 27, Original, January 3, 1979, pp. 13-14.[5]

c. Former Illinois Constitutions.

Kentucky also argues that the boundary description contained in the Illinois Constitutions of 1818, 1848 and 1870 supports this case. All three documents describe Illinois' boundary with Kentucky on the Ohio River as running "along its northwestern shore". Illinois Constitution of 1818, Introduction; Illinois Constitution o´ 1848, art. I; and Illinois Constitution of 1870, art. I.[6]

According to Kentucky this language supports its theory that Illinois has acquiesced to the use of the general term "low-water mark along its northwestern shore", and that this term means the low-water mark as it exists

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[5] A copy of the Special Master's Report can be found in the Record as Filing 41, Exhibit 11.

[6] Copies of the boundary provisions of the Illinois Constitutions of 1818, 1848 and 1870 are included in the Record as Filing No. 41, Exhibit 13.

from time to time, rather than the 1792 low-water mark. This claim is inexplicable.

As the Special Master noted, the boundary language incorporated into the three prior Illinois Constitutions is merely a verbatim recitation of the language used by Congress to describe Illinois' boundaries in its Enabling Act of April 18, 1818, 3 Stat. 428 (1818). Filing No. 41, Exhibit 14. Given this fact, the language in question cannot conceivably be said to demonstrate acquiescence as claimed by Kentucky. Acquiescence is an equitable doctrine that recognizes the state's acceptance of a boundary different than that which the law would otherwise recognize. Here, the Illinois constitutional provisions adopted precisely the boundary which was provided by Congress in creating the State of Illinois, and as the Special Master points out, there is nothing in the record to suggest Congress meant Illinois' boundary with Kentucky to be any different than that of Indiana or Ohio, "to wit, the low-water mark as it existed in 1792". Report of Special Master at 28.

d. The *Geography of Illinois.*

Kentucky also continues to rely on the *Geography of Illinois,* written by Douglas C. Ridgely, and published in 1921 as support for its defense of acquiescence. That book, in the section entitled *Legal State Boundary,* identifies Illinois' southern boundary as being located "along the northwest shore of the Ohio River", and then concludes that "It thus happens that the Ohio River and its islands are in Kentucky, not in Illinois, Indiana, or Ohio."

First of all, Illinois obviously agrees with the Special Master's conclusion that as a work of private scholarship this obscure text is not binding on the State of Illinois in this case. Kentucky argues, on the other hand, that it is admissible to show "reputation in the community".

Even if Kentucky is correct in this point, its reliance on this forgotten work is misplaced since the author's

meaning is anything but clear. If, for example, the above passage is interpreted simply to mean that all islands in existence when Kentucky became a state in 1792 belong to Kentucky, then this passage in no way conflicts with Illinois' position in this case, since any island existing in 1792 would have been south of the 1792 low-water mark. See *Handly's Lessee v. Anthony, supra* at 380.

e. Report of Joint Select Committee.

Finally, Kentucky seeks to rely on a document entitled "Report of the Joint Select Committee Appointed to Investigate the Nature and Extent of the Jurisdiction of Illinois Over the Ohio River" as evidence of acquiescence on the part of Illinois. Filing No. 12(h). This report was submitted by the committee to the Illinois legislature on January 25, 1849. The report begins by stating that "It is conceded that the Ohio river to low water mark is included within the limits of the state of Kentucky." Report of Joint Select Committee, Filing No. 49(e) at 1.

Illinois concedes as much today. The boundary between Illinois and Kentucky is the low-water mark, and neither party to this litigation disputes that basic premise. The point of contention concerns the time at which that low-water mark is to be determined. While the statement just quoted does not specifically claim the 1792 low-water mark, it also does not acknowledge the low-water mark "as it exists from time to time".

2. Illinois has asserted authority over a portion of the Ohio River.

a. Illinois case law.

The first Illinois decision to address the boundary question is *Ensminger v. People*, 47 Ill. 384 (1868). Like most of the cases in Kentucky courts addressing the subject of the Ohio River boundary, however, the *Ensminger* case is of limited value in resolving the present

controversy. It merely identifies the Illinois-Kentucky boundary as being the low-water mark on the Illinois shore without any discussion of the point in time at which that low-water mark is to be determined. The Illinois Supreme Court's silence on this point, however, does not support Kentucky's claim of acquiescence.

In *Union Bridge Co. v. Industrial Commission*, 287 Ill. 396 (1919), the issue was whether the Illinois Industrial Commission had jurisdiction over an accident which took place on a bridge pier being constructed in the Ohio River. The court concluded that since the facts established that the accident took place 1,185 feet south of the low-water mark, it was outside the jurisdiction of Illinois.

Unfortunately, the opinion is silent as to how the court determined the location of the low-water mark, and this decision is, like *Ensminger*, therefore of limited value here. All that can safely be said is that it does not support Kentucky's claim of acquiescence to the low-water mark as it exists from time to time.

The most significant Illinois decision involving the Ohio River boundary is undoubtedly *Joyce-Watkins Co. v. Industrial Commission*, 325 Ill. 378 (1927). This case once again involved the question whether the Illinois Industrial Commission had jurisdiction over an accident which took place on or over the Ohio River. The injury took place at a point roughly 8-10 feet from the water's edge on a railroad incline that extended approximately 260 feet into the river from the Illinois shore.

In rejecting the employer's argument that the accident occurred outside the boundaries of the State of Illinois, the court began by citing *Indiana v. Kentucky* for the proposition that Illinois' boundary with Kentucky was the low-water mark on the northwest shore of the Ohio River. The court then noted, however, that no commission had ever been appointed to determine the location of that line, and that it was not appropriate to ascertain the actual boundary in the case before it.

The court was nonetheless able to resolve the dispute without locating the precise boundary because of its conclusion that the phrase "low-water mark" when used to define a boundary meant "the point to which the waters at that river have receded at its lowest stage". *Id.* at 383. Because of this interpretation, the court did not need to ascertain the precise location of the boundary as it existed on the day of the accident, but had only to determine if the low-water mark at the point in question had *ever* been south of the place of injury. Evidence in the record established that the Ohio River had on occasion retreated past the end of the railroad incline, which on the date of the accident extended approximately 260 feet into the river. As a result, the court concluded that the low-water mark had at one time existed approximately 250 feet south of the injury, and that the accident had therefore occurred within the boundaries of the State of Illinois.

Kentucky in its Exceptions notes that both Illinois and the Special Master's Report place heavy reliance on the *Joyce-Watkins* decision. In discussing this case, however, Kentucky notes only that the court recognized that the low-water mark was not a "definitely fixed boundary" but one that would move over time. The remark fails, however, to comment on the most important aspect of the *Joyce-Watkins* decision. While the Illinois Supreme Court did contemplate a moving boundary, it is obvious, as the Special Master observed, that the movement envisioned by the court would be exclusively in favor of Illinois as each record drought would move the boundary further southward. Once the low-water mark retreated to a given level at a particular point along the river, it would never again move higher or northward. Rather than demonstrating acquiescence to the boundary Kentucky claims in this litigation, the *Joyce-Watkins* decision stands for a claim to a boundary more favorable than the 1792 line. Subsequently, the rule set out in the *Joyce-Watkins* decision was cited for nearly 50 years by the judicial and

executive branches of Illinois government. See the Opinion of Illinois Attorney General William G. Clark issued September 18, 1961, 1961 Ill. Att'y Gen. Op. 215, Filing No. 10(f), two letters written by the Illinois Department of Revenue on July 24, 1944 and August 22, 1946, Filing No. 41, Exhibit 18, and the decision of the Illinois Appellate Court in *People ex rel. Scott v. Dravo Corp.*, 10 Ill. App. 3d 944 (1973).

Although Illinois acknowledges that the *Joyce-Watkins* case misapplied the holding in *Indiana v. Kentucky*, the continued adherence by Illinois authorities to this rule from 1927 through 1973 directly refutes Kentucky's claim that Illinois acquiesced to a boundary represented by the low-water mark as it exists from time to time. In fact, if one were to apply Kentucky's theory of acquiescence in this case to the period of 1927 to 1973, it could be argued that Kentucky's failure to bring an original action against Illinois in light of the *Joyce-Watkins* decision constituted acquiescence by Kentucky to the definition of the low-water line set forth in that case. Illinois does not make this claim, however, because it recognizes that the 1792 low-water mark is binding on Kentucky and the three states bordering her to the north, including Illinois. Illinois' acceptance of this fact is reflected in Opinion No. 80-041, issued by Attorney General Fahner of Illinois on December 10, 1980. 1980 Ill. Att'y Gen. Op. 149, Filing No. 41, Exhibit 19.

b. Illinois legislative and executive actions.

Additional evidence of Illinois' assertion of jurisdiction over a portion of the Ohio River can be found in legislation adopted by the Illinois General Assembly and enforcement of these statutory provisions by the executive branch of Illinois government. One example of such legislation is a statute enacted by the Illinois legislature on June 10, 1897, making it unlawful "to occupy any boat or other water craft upon the *Ohio*, Mississippi, Wabash, Illinois, or other navigable river, lake or other course,

within this State * * * without first obtaining * * * a license." Laws of Illinois 1897, p. 248, Filing No. 10(k). Emphasis added.

Although this statute does not specify that portion of the Ohio River – or for that matter Mississippi, Wabash or Illinois rivers – that is "within this State", it nevertheless constitutes an unequivocal assertion that some portion of each of these rivers, including the Ohio, is within the boundaries of Illinois. Its existence, therefore, refutes Kentucky's allegation that Illinois has never exercised jurisdiction over any portion of the river. This statute remained in effect until January 1, 1962. Filing No. 53 at 2 and Filing No. 55, Exhibit 22. Enclosed with the supplemental material submitted by Illinois were copies of county court documents disclosing prosecutions under this statute for unlawfully occupying shanty boats on the Ohio River without a license. Filing No. 55, Exhibits 23-26.

In addition to these prosecutions under the shanty boat licensing statute, Illinois also submitted copies of documents describing criminal prosecutions of individuals cited for maintaining a house of prostitution on the Ohio River. Filing No. 55, Exhibits 27 and 28. Once again, these prosecutions demonstrate an assertion of authority by the executive branch over the Ohio River pursuant to Illinois legislation.

As the Special Master noted, further evidence of Illinois' assertion of jurisdiction over the Ohio River is found in permits issued by the Illinois Department of Transportation, and its predecessor, the Department of Public Works and Buildings. The permits may, as the Special Master observed, be grouped into five general categories: (1) construction of docks, mooring anchors, access ramps, and other structures built in, on, or over the river; (2) dredging of sand and gravel; (3) bridge construction; (4) bank protection; and (5) sewage and water outlets or inlets.

In its arguments before the Special Master, Kentucky claimed that these permits represented no support for Illinois' position, since they deal only with the development of the Illinois shoreline. In its Exceptions to the Report of the Special Master, Kentucky apparently eschews this particular argument and replaces it simply with the statement that these permits "do not prove that Illinois had not acquiesced to Kentucky's exercise of jurisdiction." Exceptions at 41. Kentucky offers no substantiation whatsoever for this statement.

In fact, as noted by the Special Master, these permits constitute a very strong point in favor of Illinois' position. The permits were issued by an agency of the State of Illinois pursuant to "An Act in relation to the regulation of the rivers, lakes and streams of the State of Illinois", Ill. Rev. Stat. 1987, ch. 19, par. 52 et seq. Section 18 of the Act (Ill. Rev. Stat. 1987, ch. 19, par. 65)[7] provides that:

> It is unlawful to make any fill or deposit of rock, earth, sand, or other material, or any refuge matter of any kind or description or building or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulk head, jetty, causeway, harbor or mooring facilities for water craft, or build or commence the building of any other structure, or do any work of any kind whatsoever in any of the *public bodies of water within the State of Illinois*, without first submitting the plans, profiles and specifications therefor and such other data and information as may be required to the Department of Transportation of the State and receiving a permit therefor signed by the Secretary of the Department and authenticated by the seal thereof.

Emphasis added.

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[7] The statute, including the permit requirement, was first enacted June 10, 1911, and was effective July 1, 1911. (Laws of Illinois 1911, p. 115.)

Copies of the 73 permits issued by the State of Illinois between April 10, 1922 and September 15, 1988 are a part of the record. Filings 42(a) to 42(d) and Filing 55, Exhibits 29-33. As is evident from the examples of these permits cited by the Special Master, many involve structures built a significant distance into the river from the existing Illinois shoreline. Report at 34-36. Others, such as Permit No. 4814, issued to Yourtee-Roberts Sand Company, on February 5, 1941, authorize the applicant to "dredge sand and gravel *in that part of the Ohio River within the State of Illinois* between the mouth of the river and Metropolis in Massac County, Illinois". Filing 42(a), Exhibit 20, Vol. 1, p. 171. Emphasis added. Although not express assertions of the 1792 low-water mark, these permits directly refute Kentucky's claim that Illinois has never exercised jurisdiction over any part of the river.

Kentucky seeks to avoid the effect of these permits on this litigation by citing this Court's decision in *New Jersey v. Delaware*, 291 U.S. 361 (1934). In that case, the two states disputed their boundary over a portion of the Delaware River. Delaware claimed that its jurisdiction extended to the low-water mark on the eastern or New Jersey side of the river, while New Jersey claimed to the middle of the main channel.

New Jersey sought to defeat Delaware's claim by arguing that the construction of wharves and piers projecting into the river from the New Jersey shore past the low-water mark was inconsistent with Delaware's claim. This Court responded that the construction of these structures by riparian owners on the New Jersey shore indicated no abandonment of Delaware's claim of title to the low-water mark, however. The Court based this conclusion on the fact that riparian owners enjoy a right of access to a river which allows them to build wharves and piers even though the title to the bed of the river may reside in another state.

Kentucky's citation of this case in the present controversy is unavailing. Here, it is not the construction of the structures by private entities that Illinois and the Special Master rely upon as demonstrating Illinois' assertion of jurisdiction over a portion of the Ohio River. It is the requirement that before building these structures the owners must obtain an Illinois permit pursuant to a statute regulating construction within "the public bodies of water within the State of Illinois".

C.

The supplemental materials submitted by the parties support the conclusion that Kentucky has failed to meet its burden of proof on the issue of acquiescence.

Following oral argument before the Special Master, both parties submitted additional documentary evidence at the Special Master's request. As he observed in his Report at page 37, the most impressive and significant aspect of this supplemental material was the lack of taxation by either state of the vast majority of structures and buildings extending from the Illinois shore into the Ohio River.

Illinois identified 15 such structures built on its shore and extending into the river. Filings No. 56-58. The only one definitely taxed by Illinois, however, is the Bunge facility located in Alexander County, Illinois. According to the Alexander County supervisor of assessments, an attempt was made in 1979 to locate the low-water mark relative to this structure. As a result, it was determined that of the 170 feet extending past the shore, the first 70 feet were north of the low-water mark and subject to tax in Illinois. Filing No. 56, Exhibit 64.

In Hardin and Gallatin counties, Illinois, the taxing officials are uncertain as to whether such structures are being taxed. Filing No. 57, Exhibits 98 and 103. In addition, the Hardin County supervisor of assessments also

stated that she has not included on the tax roles a partially constructed barge loading facility begun during her term of office due to her uncertainty as to the boundary's location. Filing No. 57, Exhibit 98.

In discussing this evidence, Kentucky claims that the failure of Illinois taxing officials to tax all 15 of these structures is clear-cut evidence in support of its claim of acquiescence. Exceptions at 33. Illinois acknowledges that if the record showed Kentucky to be taxing those portions of all 15 structures that extend into the Ohio, Kentucky's point would be well taken. In fact, however, Kentucky claims to tax only one such facility, the Electric Energy Power Plant, near Joppa, Illinois. Filing No. 61, Exhibit 93. Although Kentucky has attempted to tax a 250 feet conveyer owned by the Bulk Service Company and located at Mound City, Illinois, Filing No. 61, Exhibits 86-92, Bulk Service has protested that assessment on the ground that its property is located in Pulaski County, Illinois, not Kentucky. Filing No. 61, Exhibit 87.

Rather than showing a continuous assertion of jurisdiction over the entire Ohio River as Kentucky claims, the evidence regarding taxation shows instead that a kind of taxing "no man's land" exists based on uncertainty in both states as to the boundary's true location. This uncertainty is totally incompatible with a finding of acquiescence.

Similarly, the other supplemental materials submitted by Kentucky fail to support its case. Mineral leases granted by Kentucky counties, for example, which are limited by their terms to the territory "within the boundaries" of those counties in no way identify where the boundaries of those counties might be. See Filing No. 61, Exhibits 117-119. Likewise, Kentucky's other evidence regarding taxes on barges and ferries, fishing and boating licenses, and old newspaper articles fails to establish Kentucky's claim to the boundary it asserts in this case, and as a result its boundary remains the 1792 low-water mark.

D.

Laches.

Kentucky continues to assert laches as a separate defense. As noted by the Special Master at pages 41-42 of his Report, however, a boundary dispute such as this is essentially a dispute between sovereigns, *Rhode Island v. Massachusetts*, 12 Pet. (37 U.S.) 657 (1838), and as such laches is unavailable. *United States v. Summerlin*, 310 U.S. 414, 416 (1940). Instead, the equitable principles inherent in the defense of laches are made applicable to the sovereign through the defense of acquiescence.

Furthermore, the basis for Kentucky's defense of laches is precisely the same as its defense of acquiescence and is equally flawed. The faulty premise underlying both is that Illinois has waited 168 years to claim the 1792 low-water mark and that this has resulted in surprise and disadvantage to Kentucky. In order to establish this premise, however, Kentucky would have to establish that it has continuously claimed a boundary other than the 1792 low-water mark since Illinois' admission to the Union in 1818, and this it cannot do.

As repeatedly pointed out, Kentucky has *never* claimed the boundary it asserts in this litigation in any formal sense either before or after 1818, with the exception of its briefs in this case and its earlier litigation with Ohio. Instead, beginning with its argument before this Court in *Indiana v. Kentucky* in 1890, and continuing through *Perks v. McCracken* in 1916, Opinion No. OAG 63-847 issued by the Kentucky Attorney General in 1963, and Information Bulletins Nos. 81 and 93 issued by the Kentucky Legislative Research Commission in 1969 and 1972, respectively, the only boundary Kentucky has ever formally acknowledged has been the 1792 low-water mark. When these sources are considered together with the decisions of this Court in *Indiana v. Kentucky*, *Henderson Bridge Co. v. Henderson City*, and *Ohio v. Kentucky*, it is simply impossible to give any credence to Kentucky's

plea that it has been surprised or disadvantaged by Illinois' claim to the same boundary that Kentucky and this Court have both recognized for 100 years.

E.

Accretion, erosion and avulsion.

Although originally set out in Kentucky's Answer as a separate defense, Kentucky now takes the position that the principles of accretion, erosion and avulsion will only be applicable to the Illinois/Kentucky boundary if it prevails on its defense of acquiescence. Exceptions at 48.

III.

THE CONSTRUCTION OF DAMS ON THE OHIO RIVER HAS PERMANENTLY RAISED THE LEVEL OF THE RIVER ABOVE ITS LEVEL IN 1792 SO THAT THE PRESENT LOW-WATER MARK IS FARTHER NORTH THAN THE LOW-WATER MARK IN 1792.

Although in its Answer Kentucky denied any effect on the level of the river resulting from the construction of dams, it now grudgingly concedes that "the effect of the dams was to raise the level of the water and that some changes may have occurred in the shoreline." Exceptions at 49.

Kentucky continues, however, to make no direct concession as to the effect of the dams on the low-water mark itself. In fact, however, the affidavits of William Kreisle, Filing No. 41, Exhibit 1, David Beatty, Filing No. 41, Exhibit 2, and Kentucky's own witness, Dr. Petersen, Filing No. 61, Exhibit 156, together with various maps submitted or referred to by both parties, see Filing No. 44, make it unmistakably clear that the 1792 low-water mark is south of the existing low-water mark.

CONCLUSION

Illinois submits that the conclusions of the Special Master are fully supported by the record and that his Recommendations should be adopted by this Court.

Respectfully submitted,

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